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IN THE

Supreme Court of the United States

October Term, 1965

DANIEL R. GEVINSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Daniel R. Gevinson, Petitioner, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the above styled cause.

OPINIONS OF THE COURT BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit in the above styled and numbered cause is reported as *Gevinson v. United States*, 358 F.2d 761 A true copy of the opinion is attached as Appendix D (Pages 30 to 39).

The judgment of the United States District Court for the Northern District of Texas, Dallas Division, is attached as Appendix E (Pages 41 to 42). The judgment of the Court of Appeals is attached as Appendix F (Page 43).

GROUNDS OF JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered under date of April 1, 1966. Petition for Rehearing was filed under date of April 20, 1966, within the time allowed by Fifth Circuit Rule 29. The Petition for Rehearing was denied under date of May 10, 1966.

Jurisdiction of the Supreme Court of the United States of America is invoked under the provisions of 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

Petitioner was charged and convicted under only a portion of 18 U.S.C.A. 1010. That portion of the statute reads as follows:

> "Whoever * * * for the purpose of influencing *in any way* the action of such [Federal Housing] Administration, makes, passes or utters any statement knowing the same to be false * * * shall be fined not more than $5,000.00 or imprisoned not more than two years or both." (Emphasis added).

The indictment did not allege the specific intent to mislead, deceive or defraud. It did not allege any of the specific statutory "purposes of influencing" specified elsewhere in the statute. The Trial Court refused to instruct on the specific intent to mislead, deceive, or defraud. It refused to limit the jury to the specific statutory "pur-

poses of influencing" specified elsewhere in the statute. It did not instruct on the "two-witness, overt act" doctrine. The questions presented for review are:

I (A) Whether the specific intent to mislead, deceive or defraud is an essential element of the offense proscribed by the above quoted portion of 18 U.S.C.A. 1010.

(B) Whether an indictment under the above quoted portion of 18 U.S.C.A. 1010 must allege the specific intent to mislead, deceive or defraud.

(C) Whether in a prosecution under the above quoted portion of 18 U.S.C.A. 1010 the Trial Court must instruct the jury that "for the purpose of influencing" means to act with the specific intent to mislead, deceive or defraud.

II (A) Whether the phrase "for the purpose of influencing in any way" as contained in the above quoted portion of 18 U.S.C.A. 1010 is limited by the specific statutory purposes specified elsewhere in the statute.

(B) Whether an indictment under the above quoted portion of 18 U.S.C.A. 1010 must allege as a "purpose of influencing" one or more of the specific statutory purposes specified elsewhere in the statute.

(C) Whether in a prosecution under the above quoted portion of 18 U.S.C.A. 1010 the Trial Court must limit the jury on "purpose of influencing" to the specific statutory purposes specified elsewhere in the statute.

III. Whether the "two-witness, overt act" doctrine is applicable to a false statement prosecution under

18 U.S.C.A. 1010 and 18 U.S.C.A. 2(b), particularly in view of the declarations of this Court in *Hammer v. United States*, 271 U.S. 620, 46 S.Ct. 603, and *American Communications Assn. v. Douds*, 339 U.S. 382, 411, 70 S.Ct. 674, 690.

IV. Whether Petitioner has been convicted without evidence of guilt and therefore has been deprived of due process of law as defined in *Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, and *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1010. Federal Housing Administration Transactions.

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more

than two years, or both. June 25, 1948, C 645, 62 Stat. 751.

18 U.S.C. §2 (b). Principals.

Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, §17b, 65 Stat. 717.

STATEMENT OF THE CASE

Petitioner was indicted, convicted and assessed the maximum penalty under only a portion of 18 U.S.C.A. 1010. That portion is italicized in the following quotation of the full text of the statute:

"§1010. Federal Housing Administration transactions.

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or *for the purpose of influencing in any way the action of such Administration, makes, passes, utters or publishes any statement, knowing the same to be false,* or alters, forges, or counterfeits any instrument, paper or document, or utters, publishes, or passes as true any instrument, paper or document, knowing it to have been altered, forged, or counterfeited, or wilfully overvalues any security, asset or income, *shall be fined not more than $5,000.00 or imprisoned not more than two years, or both.*"

The indictment (Appendix A, pp. 23-24, Cert. Tr. I, 1-2) did not charge the specific intent to mislead, deceive or defraud. It did not charge as a "purpose of influencing" any of the statutory purposes elsewhere specified in the statute. It did not allege any specific non-statutory purpose.

Petitioner did not personally make the alleged false statements. He was prosecuted for *causing* them under 18 U.S.C.A. 2 (b).

The basis of the prosecution was a letter dated October 5, 1961, written by an architect, Parker Folse, to the Federal Housing Administration (Govt. Ex. 2, Appendix B, p. 25, Cert. Tr. 180-181). The letter enclosed a list, also prepared by Folse of 33 cost items. These cost items were treble-designated in the letter as "subcontract bids, proposals and estimates." The letter expressly qualified the cost figures in the enclosed list by additionally stating:

> "I believe these costs are true and accurate though in all cases they may not be the ultimate ones by which contracts will be awarded. By this I mean to explain that negotiations will continue until the owner and architect are satisfied that the quality of the materials and workmanship bid are commensurate with the plans and specifications and represent the best economies."

This letter and list was forwarded only after an agency official, G. R. Martin, Jr., had stated to Folse that "the list would be of little benefit to me" but that he would be willing to receive "substantially the lowest bids". (Cert. Tr. I, 176 and II, 293).

Folse testified that he wrote the letter under the instructions of Petitioner. As to the express instructions he testified:

"Dr. Gevinson asked me to present a well-arranged list of the lowest bids that he had obtained at that time." (Cert. Tr. I, 173).

* * *

"He said let's start getting these bids together, these lowest bids and start making out this list." (Cert. Tr. I, 174).

* * *

"He asked me to—after I had assembled the bids together, to write the list, summary of the lowest bids, and write a cover letter which would set forth what this was." (Cert. Tr. I, 177).

Falsity was predicated on the fact that three of the cost items in the list forwarded by Folse, those for (1) Elevators (2) Electrical Installations, and (3) Plumbing and Refrigeration, were higher in dollar figures than three proposals, not forwarded, pertaining to the same three categories. *However, those not forwarded were based on different plans and specifications and lesser scopes of work.* (See the testimony of the Government witnesses on this point in Appendix C, pp. 26 to 29).

Though the Petitioner made requests therefor, the trial court gave no instructions requiring a specific intent to mislead, deceive or defraud. The instructions were affirmatively to the contrary:

"It is not necessary for the Government to prove that the Defendant ever intended to cause the FHA to suffer some monetary loss." (Cert. Tr. I, 83).

Though Petitioner made requests therefor, the trial court gave no instructions limiting the "purpose of influencing" to a specific statutory purpose, nor to a specific non-statutory purpose. The instructions were affirmatively to the contrary:

> "It is sufficient for the Government to show * * * that it was made or caused to be made for the purpose of influencing *some* action of the FHA." (Cert. Tr. I, 83). (Emphasis added).

There were no instructions applying the "two-witness, overt act" doctrine.

The Court of Appeals affirmed. It expressly recognized, but overruled, Petitioner's point on specific intent to mislead, deceive, or defraud: "The required criminal intent was also made clear to the jury although not in the terms of the charge in *United States v. Niro* (2nd Cir.), 338 F.2d 439, as Appellant would have it done." The "Two-witness, overt act" doctrine was expressly rejected: "Finally, we reject the contention that the 'Two-witness, overt act' rule applicable in perjury prosecutions should be applied here as a requirement to prove the falsity of the statements attributed to Appellant." A petition for rehearing *en banc* was denied by the same three-judge panel. (Appendix G, p. 44).

REASONS FOR GRANTING THE WRIT

I.

The Specific Intent to Mislead, Deceive or Defraud.

Though the phrase "for the purpose of influencing" has long been contained in two criminal statutes penalizing false statements, (18 U.S.C.A. 1010, penalizing false statements to the Federal Housing Administration and 18 U.S.C.A. 1014, penalizing false statements to the Reconstruction Finance Corporation) the legal connotation of the phrase has not been determined by this Court. Definition by this Court is needed for the reason that the Second and

Fifth Circuits are apparently in conflict on whether the phrase defines the required intent as a specific intent to mislead, deceive or defraud.

In *United States v. Niro* (2nd Cir.) 338 F.2d 439 the Second Circuit interpreted 18 U.S.C.A. 1014, which statute contains almost the identical language as that portion of 18 U.S.C.A. 1010 under which Petitioner was prosecuted and convicted. The analogous portion of 18 U.S.C.A. 1014 reads as follows:

> "Whoever knowingly makes any false statement * * * for the purpose of influencing in any way the action of the Reconstruction Finance Corporation * * * shall be fined not more than $5,000.00 or imprisoned not more than two years or both."

The *Niro* opinion held that the phrase "for the purpose of influencing" defined the required intent and meant a specific intent to mislead, deceive, or cheat:

> "The words 'for the purpose of influencing' were included in the Statute to define the quality of the required intent * * *"
>
> "The charge appropriately defined the required intent * * * (Continued from Footnote 2 of the opinion) To act 'for the purpose of influencing' means to act knowingly and with the specific intent to mislead, deceive, or cheat, for the purpose of either causing some financial loss to another, or bringing some financial gain to oneself."

In the opinion below the Fifth Circuit expressly refused to require a specific intent to mislead, deceive or defraud and rejected the ruling in *Niro;* we quote:

> "The required criminal intent was also made clear to the jury although not in the terms of the charge in

United States v. Niro, (2nd Cir., 1964) 338 F.2d 439, as appellant would have it done."

Thus there exists a conflict between the Circuits on the meaning of the statutory phrase "for the purpose of influencing". The phrase is obviously a "word of art" final definition of which is needed for the due administration of criminal justice. See *Morrissette v. United States,* 342 U.S. 246, 72 S.Ct. 240.

In *Kay v. United States,* 303 U.S. 1, 58 S.Ct. 468 this Court had occasion to comment on 18 U.S.C.A. 1014 [then 12 U.S.C.A. 1467 (a) §8 (a)] and there implied that the phrase "for the purpose of influencing" connotated a specific intent to mislead, deceive, or defraud as an element of the offense:

> "It does not lie with one knowingly making false statements *with intent to mislead* the officials of the corporation to say that the statements were not influential or the information not important. There can be no question that Congress was entitled to require that the information be given in good faith and not falsely *with intent to mislead.* Whether or not the corporation would act favorably on the loan is not a matter which concerns one *seeking to deceive* by false information." (Emphasis added).

As to statutory crimes this Court has repeatedly imposed the requirement of a specific intent, even though not expressed in the statute by Congress. *Spies v. United States,* 317 U.S. 492, 63 S.Ct. 364; *Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031; *Morrissette v. United States,* 342 U.S. 246, 72 S.Ct. 240.

Consistency of decision requires that the specific intent to mislead, deceive or defraud be imposed as the essential

element of the offense under 18 U.S.C.A. 1010. The many other penal statutes regulating financial transactions to which the Government is a party have been consistently interpreted to require a specific intent to mislead, deceive or defraud as an essential element of the offense. They are outlined as follows:

MISAPPLICATION OF BANK FUNDS
18 U.S.C.A. 656

Though the present statute does not so require, the Courts impose the element of a specific intent to defraud. *Williamson v. United States* (5th Cir.) 332 F.2d 123; *Golden v. United States* (1st Cir.) 318 F.2d 357.

STATEMENTS OR ENTRIES GENERALLY
18 U.S.C.A. 1001

The specific intent to defraud is a necessary element, *United States v. Jaben* (W.D. Mo.) 224 F.Supp. 603 (Relying on *Morrissette v. United States*, 342 U.S. 246, 72 S.Ct. 240).

BANK INTEREST, REPORTS AND TRANSACTIONS
18 U.S.C.A. 1005

Specific intent to defraud is a necessary element. "This is so because it is not true that every making of a false entry in a bank's book is done with intent to defraud the bank. Such an entry may, while false, be entirely innocently made." *Harrison v. United States* (5th Cir.) 279 F.2d 19; *Scoblick v. United States* (3rd Cir.) 225 F.2d 779.

FALSE STATEMENTS TO THE RECONSTRUCTION FINANCE CORPORATION
18 U.S.C.A. 1014

"It does not lie with one knowingly making false statements *with intent to mislead* the officials of the corpo-

ration to say that the statements were not influential or the information not important. There can be no question that Congress was entitled to require that the information be given in good faith and not falsely *with intent to mislead*. Whether or not the corporation would act favorably on the loan is not a matter which concerns one seeking to deceive by false information." *Kay v. United States*, 303 U.S. 1, 58 S.Ct. 468. (Emphasis added).

"To act 'for the purpose of influencing' means to act knowingly and with the specific intent to mislead, deceive, or cheat, for the purpose of either causing some financial loss to another, or bringing some financial gain to oneself." *United States v. Niro* (2nd Cir.) 338 F.2d 439.

MAIL FRAUD
18 U.S.C.A. 1341

Specific intent to defraud is a necessary element. *Rice v. United States* (10th Cir.) 149 F.2d 601; *Estep v. United States* (5th Cir.) 223 F.2d 19.

BANKRUPTCY ACT
11 U.S.C.A. 32(c)

A false statement to be penal under this statute must be one made with intent to defraud or deceive. *Feldenstein v. Radio Distributing Co.* (6th Cir.) 323 F.2d 892.

INCOME TAX EVASION
26 U.S.C.A. 7201

The Courts impose as a necessary element the specific intent to defeat or evade payment of tax. *Spies v. United States*, 317 U.S. 492, 63 S.Ct. 364; *Mann v. United States* (5th Cir.) 310 F.2d 404. See also *Tomlinson v. Lefkowitz* (5th Cir.) 334 F.2d 362, holding that the term "willfully" as used in §145(b), Internal Revenue Code 1939, necessarily includes the element of fraud.

II.

Limitation "For the Purpose of Influencing" to the Specific Statutory Purposes.

Interpretation by this Court of the statutory phrase "for the purpose of influencing *in any way* the action of such Administration" (Emphasis added) is needed because of the breadth and vagueness of the phrase "in any way". The issue can best be put by a *reductio ad absurdum*: For the purpose of influencing the Administration to postpone a business conference on a loan application an employee of a mortgage company advises he is ill in bed. In truth he is in good health but falsifies to be able to attend a baseball game. Under the literal language of the phrase "in any way" he would be guilty of the crime.

The vagueness of the phrase "in any way", to use the language of this Court, is "as much of a trap for the innocent as the ancient laws of Caligula". *United States v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189. Unless the phrase is limited there are serious questions as to its constitutionality because of its failure to set an ascertainable standard of guilt. See *United States v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189; *Screws v. United States*, 325 U.S. 106, 65 S.Ct. 1031; *United States v. Cohen Grocery Co.*, 225 U.S. 109, 41 S.Ct. 298; *Connally v. General Construction Company*, 269 U.S. 385, 46 S.Ct. 126; *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 45 S.Ct. 295; *Weeks v. United States*, 255 U.S. 109, 41 S.Ct. 306; *International Harvester Co. v. Kentucky*, 234 U.S. 216, 34 S.Ct. 852.

Elsewhere in the statute Congress expressed certain specific statutory purposes [(1) "of obtaining any loan or advance of credit * * *" (2) "of obtaining any extension or renewal

of any loan, advance of credit, or mortgage * * *" (3) "of obtaining the acceptance, release, or substitution of any security on such a loan, or advance of credit * * *"]. Limitation of the phrase "in any way" to these specific statutory purposes would set an ascertainable standard of guilt and avoid serious questions of constitutionality.

The Second and Sixth Circuits, though not expressly treating of constitutionality, have nevertheless limited "purpose of influencing such Administration in any way" to the specific statutory purposes. The Second Circuit in *United States v. Pesano* (2nd Cir.) 293 F.2d 229, wrote as follows:

> "Further, this application or this statement in the application or other form supplied by the Government in connection with these loans must be *for the purpose of obtaining a loan; that is the third element of the offense;* it must be proved to your satisfaction that the false statement, the knowing false statement was made *for the purpose of obtaining a loan from a bank or other lending institution for example.*" (Emphasis added).

Subsequently, in *United States v. Niro* (2nd Cir.) 338 F.2d 439, the Second Circuit wrote:

> "The gist of the offense is knowingly making or submitting a false statement for the purpose of influencing in any way the action of the Association *upon a loan.*" (Emphasis added).

Of like importance is the declaration by the Sixth Circuit in *Steingold v. United States* (6th Cir.) 262 F.2d 1:

> "As correctly found by the trial court, this inaccurate information upon material subjects was *favorable towards extending a loan.* It justified the Court's in-

ference that the statements were knowingly made incorrect *in order to influence favorable action by the FHA.*" (Emphasis added).

The Fifth Circuit, the Court below, in substance holds in conflict with the opinions by the Second and Sixth Circuits when it affirmed the judgment of the trial court. Petitioner requested the trial court to limit the jury to a specific statuory purpose, but the trial court refused such request. It affirmatively instructed to the contrary:

> "It is sufficient for the Government to show * * * that it was made or caused to be made for the purpose of influencing *some* action of the FHA."

Reconciliation of this conflict of decisions between the Circuits is needed for the due administration of criminal justice.

III.

The "Two-Witness, Overt Act" Doctrine.

Though the "two-witness, overt act" doctrine is deeply rooted and universally applied on the issue of falsity in perjury prosecutions, *Weiler v. United States*, 323 U.S. 606, 65 S.Ct. 548, the Court below expressly rejected it as to prosecutions for false statements to Government agencies:

> "Finally we reject the contention that the "two-witness" rule applicable in perjury prosecutions should be applied here as a requirement to prove the falsity of the statements attributed to appellant."

This rejection conflicts in substance with the ruling by this Court in *Hammer v. United States*, 271 U.S. 620, 46 S.Ct. 603, wherein the doctrine was extended to prosecu-

tions for subornation of perjury for the reason that in both perjury and subornation of perjury falsity is the *corpus delicti* of the offense:

> "The rule that the uncorroborated testimony of one witness is not enough to establish falsity applies in subornation as well as in perjury cases. People v. Evans, supra. Falsity is as essential in one as in the other. It is the corpus delicti in both."

Similarly falsity is essential in, and the *corpus delicti* of, a false statement prosecution under 18 U.S.C.A. 1010 and other false statement statutes such as 18 U.S.C.A. 1001 and 1014.

The opinion of the Court below conflicts in substance with the declarations by this Court in *American Communications Assn. v. Douds*, 339 U.S. 382, 411, 70 S.Ct. 674, 690 in sustaining the validity of a false swearing statute:

> "False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations, which are as much 'overt acts' as the act of joining the Communist Party there can be no successful prosecution for false swearing."

Also in a false statement case mental state is in issue. Does it not necessarily follow that there too no prosecution can be sustained without the "overt acts" to manifest the state of mind?

The gravity of the question here discussed is demonstrated by the extensive analysis made by the Ninth Circuit in *Fisher v. United States* (9th Cir.) 231 F.2d 99, 105-106. Though that Circuit rejected the doctrine as to

false statement prosecutions it expressly recognized the substantiality of the issue:

> "The question is a close one but the reasons behind the perjury rule do not seem applicable."

The significance of the question to the due administration of criminal justice is further demonstrated by the following factors: Numerous Federal statutes create felony offenses for false statements to a multitude of Federal investigators and agencies and private personnel, encompassing daily infinite transactions. [For illustration, see 11 U.S.C.A. 32(c); 18 U.S.C.A. 1001; 18 U.S.C.A. 1010; 18 U.S.C.A. 1014; Also see 18 U.S.C.A. 911, 912, 913, 914, 915, 916, 917]. This mass of regulation by criminal penalty is so dragnet in scope that it includes even false statements as to membership in the 4-H Club and the Red Cross. 18 U.S.C.A. 916 and 917.

At most any time any citizen may become involved in a transaction out of which may arise an accusation of failing to tell the truth to any of the myriad Government investigators, representatives or agencies about most any matter, important or trivial, civil or criminal, and therefrom be faced with a false statement prosecution. He may be hailed before the Criminal Bar because of the animosity of an angered Government investigator or bureaucrat, a disgruntled business associate, or a vindictive discharged agent or employee. He may be called to defend his liberty because of the hope for remuneration by an informer. [See 26 U.S.C.A. 7623]. The ever increasing extent to which the Government's agencies have commercial, financial or other relations with private citizens constantly enlarges the possibilities of a citizen's becoming enmeshed. Under this cultural pattern, is the citizen's state of mind establishing

his innocence or guilt, and his resulting liberty or imprisonment, to depend on the uncorroborated testimony of one witness who may be biased for a number of various reasons?

IV.

The Absence of Evidence of Guilt.

Because of the Government's multitudinous and often complex business transactions with its citizens, it is important that this Court consider where, during *fluid business negotiations*, as distinguished from a static consummated transaction, a false statement arises and at what stage of such fluid negotiations the "no evidence" rule of *Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, and *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, prohibits a finding of a willfull false statement.

It is undisputed that when Folse forwarded the letter of October 5, 1961, the plans and specifications for the alleged conflicting bids had not been "finalized". Negotiations were continuing; changes were being considered. The three bids not forwarded, though lower in dollar amounts than the challenged three forwarded, were based on *different plans and specifications and lesser scopes of work*. There is no evidence that the Petitioner had lower bids based on the same plans and specifications and scopes of work.

Because the alleged conflicting bids were based on *different plans and specifications and scopes of work* the three bids not forwarded to the Administration were not "lower" bids than those forwarded. It is a universal rule of law that one bid cannot be classified as "lower" than another bid unless both bids are based on the same plans and specifications and scopes of work. *Mazet v. Pittsburgh*, 137 Pa. 548, 20 Atl. 693; *Guthrie v. Armstrong*, 303 Pa. 11, 154

Atl. 33; *Pearlman v. Pittsburgh,* 304 Pa. 24, 155 Atl. 118; *Tufano v. Borough of Cliffside Park,* 110 N.J. eq. 370, 165 Atl. 628; *International Motor Co. v. Mayor of Plainfield,* 96 N.J.L. 364, 115 Atl. 391; *Packard v. Hayes,* 94 Md. 233, 51 Atl. 32; *Goshert v. Seattle,* 57 Wash. 645, 107 Pac. 680; *Dictaphone Corporation v. O'Leary,* 287 N.Y. 491, 41 N. E.2d 68; *Fones Hardware Co. v. Erb,* 54 Ark. 645, 17 S.W. 7; *Wells v. Burnham,* 20 Wis. 119. The concept is succinctly stated by the Supreme Court of Pennsylvania in *Mazet v. Pittsburgh,* supra:

> "The expression 'lowest bidder' necessarily implies a common standard by which to measure the respective bids * * * It demands in the "letting of a contract a basis upon which bids can be compared with *mathematical precision* * * *" (Emphasis added).

See also the declaration by the Supreme Court of Arkansas in *Fones Hardware Co. v. Erb,* supra:

> "It embodies three vital principles—an offering to the public, an opportunity for competition and a basis for *an exact comparison* of bids * * *" (Emphasis added).

Folse's letter affirmatively eliminates any willful intent to falsify or mislead. He expressly classified the forwarded figures not only "bids" but also "estimates". By calling the figures "estimates" he used a word of legal connotation advising that the figures were only rough approximations calculated from incomplete data, precluding accuracy, and having no more certainty that the terms "about" or "more or less". *Bautovich v. Great Southern Lumber Co.,* 129 La. 857, 56 So. 1026; *Indiana Gas & Water Co. v. Williams,* 133 Ind. App. 8, 175 N.E.2d 31.

Further, the second paragraph of Folse's letter fully advised that negotiations were continuing and that the figures were not sufficiently final for the administration to rely on them in consummating the transaction:

> "I believe these costs are true and accurate though in all cases they may not be the ultimate ones by which contracts will be awarded. By this I mean to explain that negotiations will continue until the owner and architect are satisfied that the quality of the materials and workmanship bid are commensurate with the plans and specifications and represent the best economies."

Negation of evidence of "causing" [18 U.S.C.A. 2(b)] is shown by the testimony of Folse that Petitioner instructed him to prepare and forward only the "lowest" bids. There is no testimony that Petitioner instructed Folse to forward a bid that was not the "lowest" bid. As to the three bids in issue, the Government made no proof as to which sets of plans and specification Petitioner had in mind when he instructed Folse. Pertinent to this state of the evidence is the declaration of this Court in *American Communications Assn. v. Douds*, 339 U.S. 382, 411, 70 S.Ct. 674, 690:

> "False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations . . . there can be no successful prosecution for false swearing. [continuation from Footnote 21]. While it is true that state of mind is ordinarily relevent only when it is incidental to, and determines the quality of, some overt act . . . *the fact must not be overlooked that mental state in such cases is a distinct issue . . . of which the overt act may or may not be any proof. For example, the*

physical facts surrounding a death by shooting may be as consistent with a finding of accident as of murder. Wilfullness, malice and premeditation must therefore be proved by evidence wholly apart from the act of shooting." (Emphasis added).

It is respectfully urged that the above analysis demonstrates that Petitioner's conviction is void under the rule announced by this Court in *Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, and *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248.

CONCLUSION AND PRAYER

On the facts and authorities presented, it is respectfully urged that this Petition for Certiorari presents substantial and important questions for consideration by this Honorable Supreme Court of the United States. It is further respectfully urged that these questions should be resolved to the relief of the Petitioner.

WHEREFORE, Petitioner respectfully prays that this Honorable Supreme Court of the United States grant the Petition for Certiorari to correct the errors of the Honorable Court of Appeals for the Fifth Circuit and of the

Honorable United States District Court for the Northern District of Texas.

Respectfully submitted,

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APPENDIX "A"

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA

v.

DANIEL GEVINSON

CR. NO. 3-284
(18 U.S.C. Sections 2 and 1010)

INDICTMENT

The Grand Jury Charges:

That on or about October 5, 1961, at Dallas, Texas, within the Dallas Division of the Northern District of Texas, DANIEL GEVINSON, hereinafter referred to as defendant, did wilfully and knowingly, for the purpose of influencing the action of the Federal Housing Administration, make, pass, utter and publish, and cause to be made, passed, uttered, and published, to the Federal Housing Administration a false statement knowing the same to be false when made, that is to say, on or about October 5, 1961, the defendant did represent and cause to be represented to an agent of the Federal Housing Administration that the lowest prices obtainable on October 5, 1961, and the lowest subcontract bids on October 5, 1961, for plumbing, heating, air conditioning, ventilation and refrigeration; electrical and hydraulic, for the proposed housing project

known as Turtle Creek Towers North Apartments, were as follows:

Plumbing, heating, air conditioning, ventilation and refrigeration	$1,672,340.00
Electrical	548,000.00
Elevators, Elec. and Hydraulic	298,600.00

which amounts, as the defendant well knew, were not the lowest prices obtainable for such items on October 5, 1961, and were not the lowest subcontract bids for such items on October 5, 1961, in violation of Title 18, Sections 2 and 1010, United States Code.

A TRUE BILL

s/ Quentin D. Corley, Jr.

s/ Barefoot Sanders
UNITED STATES ATTORNEY

s/ B. H. Timmins, Jr.
ASSISTANT UNITED STATES ATTORNEY

s/ M. T. Epstein
SPECIAL ATTORNEY,
DEPARTMENT OF JUSTICE

APPENDIX "B"

Industrial and Residential Design Offices
3505 Turtle Creek ● Dallas, Texas ● LA 8-3899

October 5, 1961

Federal Housing Administration
Dallas, Texas

RE: Turtle Creek Towers North Apartments
Total of Sub Contract Bids and Estimates

Gentlemen:

Enclosed please find a list of sub-contract bids, proposals, and estimates which may facilitate the verification of costs in pricing the Turtle Creek Towers North Apartments. These prices represent the lowest prices obtainable at this date in all cases and are gathered from the files delivered under separate cover.

I believe these costs are true and accurate though in all cases they may not be the ultimate ones by which contracts will be awarded. By this I mean to explain that negotiations will continue until the owner and architect are satisfied that the quality of the materials and workmanship bid are commensurate with the plans and specifications and represent the best economies.

Sincerely,

s/ PARKER C. FOLSE, JR.
Parker C. Folse, Jr.

PCF/jw

APPENDIX "C"

Excerpts From Testimony

The following excerpts from the Certified Transcript show the testimony of the Government and Defense witnesses that the plans and specifications and scopes of work were different for the alleged conflicting bids and the factual meaning of that difference.

Government Witness G. C. Martin

"Q. In other words, these bids must be based on plans and specifications to have any meaning, isn't that true?
A. That's right, sir." (R. 302).

* * *

"Q. Would the scope of the work and the quality and the quantity thereof as set out in the plans and specifications affect the amount of the bids necessary to comply with the work?
A. Certainly." (R. 311).

Government Witness Folse

"Q. Is it possible that the lower bids for these same items could have been based upon a different set of plans and specifications?
A. I would say yes. (R. 234).

* * *

Q. Before one could determine what low bids were as to plumbing, electrical and elevators, you would need to know what set of plans and specifications and scope of work they were based on?
A. I think I know what you are trying to establish. Anything that would be of value to Dr. Gevinson and the FHA would have to be based on one and the same set of plans as presented to the FHA. (R. 234-235).

* * *

Q. All right, if the bids taken did not apply to the same set of plans then it would be impossible to say what the lowest bid was unless you knew what it was based on, wouldn't it, for a given set of work, such as plumbing?

A. I would say that's true." (R. 235).

Government Witness Glenn A. Young

"Q. Now, sir, I believe you stated that your bid of $298,600.00 looked at in the government's Exhibit No. 4, for the elevator work, did not include the same kind and quality or quality of elevator as your later bid which was $205,168.00. Is that not a fact? There was a change, there was a difference?

A. Change in the equipment, the quality—the quality was the same, it was a change in the type of elevator equipment.

Q. And this enabled you to make a cheaper and lower bid, did it not?

A. This is correct. (R. 366) * * * *

"Q. Is there not some seven changes in the plans and specifications by the architect, the possession of the architect, the FHA and the sponsor and all concerned as to the elevators on the $205,000.00 bid? Isn't that true?

A. Yes, there are seven changes outlined here." (R. 367). * * *

"Q. All right, then, Mr. Young, could you tell us whether or not the $298,600.00 bid that you initially submitted to, or proposal to Dr. Gevinson did not include different equipment than your subsequent bid or proposal of $205,168.00?

A. Yes, it included different equipment." (R. 369).

Government Witness W. O. McCollum

"Q. Mr. McCollum, of course the bid you made in this list of $298,600.00 was for a different scope and quantity of work, was it not, than you later bid

of $205,168.00? In other words, there have been changes?

A. Yes.

Q. As to the quality of the elevators installed?

A. Yes.

Q. So the $298,600.00 bid you made was not for the same scope and quality and quantity of work to be done in the installation of the elevators as the later bit of $205,168.00, isn't that right?

A. It wasn't the same." (R. 387).

Government Witness Charles A. Ling

"Q. Now with reference to the $548,000.00, that was based upon Dr. Gevinson's request for the inclusion of at least three additional items, was it not, that were not included in the $415,000.00 bid?

A. Yes, sir.

Q. So, the scope of the work to be done for the $548,000.00 was different than the scope of the work to be done for the $415,000.00, was it not?

A. Yes. (R. 433) * * *

"Q. All right, now of course, I believe the principal difference in your $548,000.00 and your $415,-000.00 figure dated the same date was the exclusion of lighting fixtures which Dr. Gevinson was going to buy himself from somebody else, wasn't it?

A. That's correct.

Q. And certain other exclusions?

A. Yes." (R. 435).

Government Witness Thomas A. O'Dwyer

"Q. Is it not true that the work you were to do to earn $548,000.00 as on that bid on the proposal dated September 25, 1961, was different from the work you were to do to earn $415,000.00 for the same project?

A. The material to be furnished was different, yes, sir." (R. 409).

Government Witness Robert B. Wallace

"Q. And is it not a fact and true that the same set of plans you based that $1,672,340.00 bid on contained a special contract condition section?

A. Yes, that's correct." (R. 456).

* * * *

"Q. Now, then, Mr. Wallace, do you find the $500,000.00 extra conditions in there anywhere with reference to the mechanical and electrical, the processing set upon which you based your bid, your old low bid of $999,000.00?

A. I do not find the section of—I believe special conditions included in this document." (R. 459-460).

Defense Witness Donald Matson

"Q. Now, Mr. Matson, the items referred to in that note, the other drawings in this master set of drawings that you have identified, would you tell the Court and Jury whether or not those other drawings listed in the note reflect upon the mechanical and electrical scope of the work as changed by the note on A-21?

A. Yes, sir.

Q. How do they affect the scope of the mechanical and electrical work, Mr. Mattson?

A. The scope of mechanical and electrical work by this change would be quite greatly affected. It would change throughout the commercial building of the mechanical and electrical in that building—would be changed. It would delete and make almost a hull of the building. It would leave only a structural frame with windows in it. It would have no interior to it. It would change it from a finished space to merely an open barn that could be finished later on.

Q. Now, would that materially affect the scope and quantity of the work to be done by the electrical and mechanical contractors?

A. Yes, it would." (R. 534-535).

APPENDIX "D"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 21890

DANIEL GEVINSON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of Texas

(April 1, 1966)

Before JONES*, Senior Judge, GEWIN and BELL, Circuit Judges.

BELL, Circuit Judge: Appellant was charged in a single-court indictment with having violated 18 USCA, § 1010[1]

* Of the Court of Claims, sitting by designation.

[1] "Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage, insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes,

by wilfully and knowingly causing false statements to be made to the Federal Housing Administration for the purpose of influencing its action. The indictment alleged that the false statements consisted of written representations to an agent of the FHA that stated prices for the elevator, electrical, and mechanical subcontracting construction phases of a proposed housing project were the lowest subcontract prices obtainable when, in fact and as appellant knew, such prices were not the lowest prices obtainable. This appeal is from the judgment of conviction entered on a jury verdict of guilty. Appellant was sentenced to imprisonment for a period of two years and fined $5,000. We affirm.

There are sixteen assignments of error. They may be categorized as claims that the indictment was insufficient; the evidence was insufficient; there were errors and omissions in the jury charge; and the court committed error in denying certain pretrial discovery.

Appellant was the sponsor of a building project in Dallas, Texas known as Turtle Creek Towers North Apartments. He had a two year option on the land on which the apartments were to be built. He sought an FHA insurance commitment. His application for such insurance on the project was rejected by the Dallas office of FHA in June 1960. He refiled and the application was again rejected in August, 1960. Washington counsel was retained and the rejection by the Dallas office was reversed. The target date

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utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or wilfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

for obtaining the FHA commitment was October 1961. The option on the land was soon to expire. The FHA sent a team of specialists to Dallas in September 1961 for the purpose of completing the processing of the application. A cost estimate of the project was required preliminary to the FHA commitment.

Sixty days was normally required to make a study of the type being made but the team was working under pressure of an October deadline. Appellant was anxious to cooperate so as to expedite the commitment. One of his associates, Mr. Folse, inquired of Mr. Martin of the FHA group whether appellant's subcontract bids would help them in expediting the question of the cost of the project. Mr. Martin told him that he would take the lowest or substantially lowest bids as one source of data in connection with the cost estimate of the project. This associate, who was on appellant's payroll, then submitted various bids and estimates totaling $8,882,242.38 to Mr. Martin. Included were bids for the mechanical,[2] electrical and elevator phases of the project. The entire submission was represented as the lowest bids, subcontract proposals and estimates available on the date of submission, October 5, 1961. The covering letter, on the stationery of Mr. Folse, added

> "These prices represent the lowest prices obtainable at this date in all cases and are gathered from the files delivered under separate cover."

The three bids in question were firm in nature as distinguished from mere tentative proposals or estimates.

The facts were that appellant had other bids in hand from the same mechanical, electrical and elevator sub-con-

[2] Referred to in the indictment and variously as plumbing, heating, air conditioning, ventilation and refrigeration.

tractors totaling some $800,000 less on the date the higher bids were submitted to FHA by Mr. Folse. Appellant's position on the trial was that Folse acted without his knowledge and without authority, and also that the lower bids in his possession related to a different scope of work. We proceed to a consideration of the errors assigned.

There is no fatal defect in the indictment. Materiality, while not alleged *in haec verba,* is alleged in substance and this is sufficient. *Bins v. United States,* 5 Cir., 1964, 331 F.2d 390. The same is true as to the contention that the jurisdiction of FHA is not alleged. A reading of the indictment makes it plain that it meets the requirements of Rule 7(c), F.R.Crim.P. It tracks the pertinent language of the statute, and apprises appellant of what he must be prepared to meet. It includes all of the essential elements of the offense, and no more is required under this statute. It is adequate for the purpose of framing a plea of former jeopardy and otherwise fully meets the standards required by the authorities. See *Yeloushan v. United States,* 5 Cir., 1964, 339 F.2d 533. *Cf. United States v. Debrow,* 1953, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92; *United States v. Nasser,* 7 Cir., 1962, 301 F.2d 243; *Brilliant v. United States,* 8 Cir., 1962, 297 F.2d 385.

The gravamen of the offense under the applicable portion of 18 USCA, § 1010 is the uttering of a false statement with the intent to influence FHA. The indictment[3] sets

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[3] "INDICTMENT

"The Grand Jury Charges:

"That on or about October 5, 1961, at Dallas, Texas, within the Dallas Division of the Northern District of Texas, DANIEL GEVINSON, hereinafter referred to as defendant, did wilfully and knowingly, for the purpose of influencing the action of the Federal Housing Administration, make, pass, utter and publish, and cause to be made, passed, uttered, and published, to the Federal Housing Administration a false statement

out the detail of the alleged false statement, that the false statement was wilfully and knowingly made and passed for the purpose of influencing the action of FHA. Anything else by way of notice could be obtained by a bill of particulars and appellant took full advantage of this remedy. The criteria laid down in *Russell v. United States*, 1962 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240, a contempt of Congress prosecution, were in no way violated.

II.

With regard to the sufficiency of the evidence to support the verdict, we must take the view most favorable to the government. *Glasser v. United States*, 1942, 315 U.S. 60, 61 S.Ct. 457, 86 L.Ed 680; *Strauss v. United States*, 5 Cir., 1963, 311 F.2d 926. The evidence adduced on the trial, stated most favorably to the government, shows that appellant was the sponsor of the project. Folse, the employee in question who dealt with the FHA specialist group, worked closely with appellant. He was told by appellant to offer assistance to the group and to suggest that bids theretofore

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knowing the same to be false when made, that is to say, on or about October 5, 1961, the defendant did represent and cause to be represented to an agent of the Federal Housing Administration that the lowest prices obtainable on October 5, 1961, and the lowest sub-contract bids on October 5, 1961, for the plumbing, heating, air conditioning, ventilation and refrigeration; electrical and hydraulic, for the proposed housing project known as Turtle Creek Towers North Apartments, were as follows:

Plumbing, heating, air conditioning, ventilation and refrigeration	$1,672,340.00
Electrical	548,000.00
Elevators, Elec. and Hydraulic	298,600.00

which amounts, as the defendant well knew, were not the lowest prices obtainable for such items on October 5, 1961, and were not the lowest subcontract bids for such items on October 5, 1961, in violation of Title 18, Sections 2 and 1010 United States Code."

obtained by appellant would be made available to the specialist group for consideration by them in making a project cost estimate. Folse then submitted bids, handed to him by appellant, under a covering letter signed by Folse. The letter was prepared by Folse and appellant on Folse's stationery. They were submitted to Mr. Martin of the FHA group. The three bids which form the subject matter of the indictment were in each instance only one of two bids from the same bidder in the possession of appellant. Folse knew only of the bids which he submitted to FHA. He did not know that appellant had lower bids in his possession.

The elevator bid submitted to FHA was in the amount of $298,600. It was dated September 11, 1961. This was very near the figure which a cost estimator in the employ of appellant had obtained from the elevator company (Otis) in June of the same year. This earlier figure was submitted by Otis for "budget purposes only" and as a suggestion based on what Otis described as "brief specifications." On October 5, 1961 appellant had in his possession a firm bid from Otis based on the plans and specifications underlying the project in the amount of $205,168. It was in the form of a submission to Otis and appellant accepted this bid in writing in his office as president of Turtle Creek Towers Apartment North, Inc. on September 30, 1961. Otis accepted it on October 5, 1961. This bid was not disclosed to the FHA group.

Appellant obtained a bid from the mechanical subcontractor on September 20, 1961 in the amount of $1,639,340[4] after stating to the subcontractor that he wanted a high estimate for the mechanical work on the project by

[4] There was an alternate item in this bid of $33,000 which accounts for the difference in the amount of this bid and the indictment figure of $1,672,340.

the next day. The president of this subcontractor testified that it was a "guesstimate" based on past experience and a preliminary review of the mechanical drawings. It too was near the estimate of appellant's cost estimator. The mechanical subcontractor was later invited to and did submit a firm bid on the work based on the plans and specifications of the project. The "guesstimate" was not accepted but it was presented by Folse to the FHA group as a bid. The firm bid on the project by this subcontractor in the amount of $999,000 was submitted by letter dated September 26, 1961 and was accepted by appellant in his capacity as corporation president on the same day. This bid was not made known to the FHA group.

On September 25, 1961 appellant obtained two bids on the project from the same electrical subcontractor. One was in the amount of $548,000 which the contractor testified was made at the request of appellant so that he might make a proper financial arrangement. The other bid was in the amount of $415,000. The bids are verbatim except for prices. They refer to the same plans and specifications. There is some confusion in the testimony as to just what these bids were to have included but appellant was satisfied to accept the lower of the bids by a longhand letter dated November 2, 1961. This lower bid was not made available to the FHA group.

All three of these low bids were in appellant's possession when he sent Folse to the FHA group with the higher bids. Of course, Folse's testimony that appellant sent him was vigorously disputed but this was a fact issue to be resolved by the jury.

Appellant also contends that the low bids were made in contemplation of a different scope of work. The project in-

cluded a two-story commercial structure adjacent to the main apartment house. This structure was to house a restaurant, supermarket, floral shop, beauty parlor, drug-store and the like. There was a special allowance provision in the plans and specifications which called for furnishings and equipment for some of these commercial endeavors and this special allowance section was deleted by the FHA in November, 1961. The deletion, according to appellant, left the structure itself in the project but limited to the frame of the building, the roof, the exterior walls, the interior fixed walls, store fronts, and doors. This deletion is said to have eliminated any roughing in by the electrical and mechanical subcontractors; and hence the low bids were applicable only to the project as revised by the deletion. The thrust of this argument is that only appellant had the prescience to know what would happen the following November. This is offered to excuse the low bids. But the deletion had not taken place when the subcontractors prepared their low bids on the plans and specifications then in effect and they testified that the roughing in was included. This made an issue of fact for the jury. Moreover, it is even disputed that the roughing in work was excluded by the November deletion. The discrepancy in the elevator bids is not explained other than by saying that the low bid was for different elevators. The commercial structure had nothing to do with the elevators.

Three additional assignments of error center on the testimony of Folse. It is contended that his testimony failed to establish criminal intent on the part of appellant, or that he caused a false statement to be made; and that his testimony established a hypothesis of inadvertence or mistake inconsistent with guilt. There is no merit whatever in these contentions.

In sum, there was undisputed proof on which an inference might be based that appellant was seeking the highest commitment possible. This, coupled with the proof of the discrepancy in the bids, the representation of the high bids only by Folse to Mr. Martin of the FHA, and that Folse was acting pursuant to instructions from appellant made out a case of knowingly and wilfully uttering and passing a false material statement with the intent to influence FHA in a transaction pending before FHA. The case was properly submitted to the jury. The evidence was sufficient to warrant the conviction. Indeed, it was more than ample.

III.

Appellant claims that there were numerous prejudicial omissions in the charge. He urges that the court failed to define the phrase "for the purpose of influencing" as it was used in the indictment; and the terms "material", "lowest bid" and "estimate." He states that the jury should have been instructed that a conviction would lie only if the purpose of the influencing was to obtain a loan or advance of credit, or to obtain an extension or renewal of a loan, or to obtain the acceptance, release or substitution of security on a loan or advance of credit. It is also urged that the court should have instructed the jury on the specific *mens rea* inherent in the phrase "for the purpose of influencing"; and the jury should have been instructed that it could convict only for material false statements. Lastly, it is said that the court erred in having failed to submit the factual issue of jurisdiction of the FHA to the jury; and in having failed to instruct on the overt acts, if any, evidencing falsity.

Most of these alleged omissions were not called to the attention of the court but we need not consider them from the standpoint of the plain error rule since they are patent-

ly without merit. We have carefully considered the charge. It was fair and adequate both from the standpoint of the applicable law and as adjusted to the issues and evidence. The court correctly charged the essential elements of the offense as being the act of knowingly and wilfully making a false statement or causing it to be made for the purpose of in some way influencing the action of FHA and with knowledge on the part of appellant that the statement was false. See generally *Bins v. United States, supra; United States v. Pesano,* 2 Cir., 1961, 291 F.2d 229; *Steingold v. United States,* 6 Cir., 1958, 262 F.2d 1, *Henninger v. United States,* 10 Cir., 1965, 350 F.2d 851. The question of materiality was one of law for the court and the court implicitly ruled on this question in denying the motions for judgment of acquittal. *Sinclair v. United States,* 1928, 279 U.S. 263, 49 S.Ct. 268, 73 L.Ed. 629; *United States v. Ivey,* 4 Cir., 1963, 322 F.2d 523; *Weinstock v. United States,* D.C.Cir., 1955, 231 F.2d 699. The required criminal intent was also made clear to the jury although not in the terms of the charge in *United States v. Niro,* 2 Cir., 1964, 338 F.2d 439, as appellant could have it done.

IV.

Appellant contends that the denial of his motion under Rule 16, F.R.Crim.P. for discovery and inspection, and under Rule 17(c) for a subpoena duces tecum constitutes reversible error. The subpoena duces tecum rule is not a discovery weapon as such, although it may be used in aid of discovery under Rule 16. See *Gilmore v. United States,* 5 Cir., 1958, 256 F.2d 565. An application for relief under these rules is a matter within the sound discretion of the court, and the controlling test is whether there was an abuse of that discretion. See *Ginsberg v. United States,* 5 Cir., Cir., 1958, 257 F.2d 950. Under the circumstances of this

case, we find no such abuse considering the showing required under Rule 16 and the unreasonableness provision in Rule. 17(c).

Finally, we reject the contention that the "two-witness" rule applicable in perjury prosecutions should be applied here as a requirement to prove the falsity of the statements attributed to appellant. It is well settled that this rule does not apply in prosecutions for making a false statement to a government agency under a similar statute, 18 USCA, § 1001. See *United States v. Marchisio*, 2 Cir., 1965, 344 F.2d 653; *Neely v. United States*, 9 Cir., 1962, 300 F.2d 67, cert. den., 369 U.S. 864, 8 L.Ed.2d 84, 82 S.Ct. 1030; *Travis v. United States*, 10 Cir., 1959, 269 F.2d 928, rev'd on other grounds, 364 U.S. 631, 5 L.Ed.2d 340, 81 S.Ct. 358 (1961); *United States v. Killian*, 7 Cir., 1957, 246 F.2d 77. It does not apply here either.

AFFIRMED.

APPENDIX "E"

JUDGMENT AND COMMITMENT

(Number and Title Omitted)

(Filed September 3, 1964)

On this the 13th day of July, 1964 came the attorney for the government and the defendant appeared in person and with counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by the jury of the offense of wilfully and knowingly made, passed, uttered and published a false statement to an agent of the Federal Housing Administration knowing same to be false in violation of Title 18 U.S.C., Sections 2 and 1010 as charged in the 1 count indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of two (2) years, and fined the sum of $5,000.00. Defendant shall become eligible for parole at such time as the board of parole may determine,

IT IS ADJUDGED that execution of sentence is suspended until 30 days from September 3, 1964 at which time defendant is ordered to surrender to the custody of the United States Marshal.

Defendant is given 60 days to pay fine.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ SARAH T. HUGHES
United States District Judge

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL

(Number and Title Omitted)

(Filed September 3, 1964)

To the Honorable United States District Judge:

IN response to the Defendant's Motion for New Trial, the Government states:

1. The Court correctly denied Defendant's Motion to Dismiss the Indictment and properly found that the indictment in this cause charged an offense under Title 18 U.S.C., Section 1010.

APPENDIX "F"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1965

NO. 21890

D. C. Docket No. 3-284-Criminal

DANIEL GEVINSON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Northern District of Texas.

Before JONES*, Senior Judge, GEWIN and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 1, 1966

* Of the Court of Claims, sitting by designation.

Issued as Mandate:

APPENDIX "G"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 21,890

DANIEL R. GEVINSON, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Northern District of Texas.
(On Petition for Rehearing)

(May 10, 1966)

Before JONES*, GEWIN, and BELL, Circuit Judges

BY THE COURT: —

It is ORDERED that the petition for rehearing in the above entitled and number cause be, and the same is, hereby DENIED.

* Senior Circuit Judge, United States Court of Claims, sitting by designation.

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226-493—66

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 198

DANIEL R. GEVINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. D) is reported at 358 F. 2d 761.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1966. A petition for rehearing was denied on May 10, 1966. The petition for a writ of certiorari was filed on June 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment stated an offense under 18 U.S.C. 1010.

2. Whether the judge properly instructed on the elements of the offense.

3. Whether the evidence supported the verdict.

STATUTE INVOLVED

18 U.S.C. 1010 provides in pertinent part:

> Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT

Petitioner was convicted after a trial by jury in the United States District Court for the Northern District of Texas on a single-count indictment charging him with wilfully and knowingly causing false statements to be made to the Federal Housing Administration for the purpose of influencing its action, in violation of 18 U.S.C. 1010 (R. I, 1–2, 89). He was sentenced to imprisonment for a period of two years and fined $5,000 (R. I, 105–106). The court of appeals unanimously affirmed the conviction.

The evidence at trial may be summarized as follows:

Petitioner was the sponsor of a building project in Dallas, Texas, known as the 21 Turtle Creek Square project (R. III, 682). He had a two-year option on the land on which the apartments were to be built (R. I, 169; R. III, 757). He made an application for F.H.A. insurance financing in June 1960, which was rejected (R. III, 652–654, 678). A re-application, dated July 11, 1960, was also rejected by the Dallas F.H.A. office in August 1960 (R. III, 655). Petitioner appealed this rejection to Washington, and the action of the Dallas office was reversed (R. III, 655). Since the option on the land was soon to expire, petitioner was assured that a F.H.A. commitment would be forthcoming by October 1961.

About September 20, 1961, a group of F.H.A. specialists, headed by Grover Martin, were sent to Dallas for the purpose of conducting the architectural processing, including the cost estimate, preliminary to a F.H.A. mortgage commitment for the Turtle Creek project (R. I, 169, 288–289). The F.H.A. specialists, working against an October deadline, were given only a few weeks to complete an analysis normally requiring approximately sixty days (R. I, 289–290).

Petitioner was anxious to help expedite the commitment and directed an associate, Parker Folse, to offer the local F.H.A. people any assistance he could (R. I, 169). On instructions from petitioner, Folse inquired of Martin whether petitioner's subcontract bids would help Martin in determining the accurate cost of the project (R. I, 172; R. II, 293). Martin responded

affirmatively and said that he would take the lowest or substantially lowest bids as one source of data in connection with the estimate on this project (R. I, 176; R. II, 293–294, 327).

Acting under petitioner's direction and supervision, Folse submitted various bids and estimates totaling $8,882,242.38 to Martin, representing them to be the lowest bids, sub-contract proposals and estimates available on October 5, 1961 (R. I, 173–196).[1] Included in the submission were subcontractor bids for the mechanical, electrical and elevator phases of the project—the items named in the indictment. These bids were firm in nature as distinguished from mere tentative proposals or estimates (R. I, 192–195).

The facts were that petitioner had other substantially lower bids totalling $800,000 less on the three

---

[1] Petitioner supplied the bids to Folse and told him they were the lowest bids to date and reflected what would be the contract cost of construction (R. I, 175–176). Folse had no knowledge of any lower bids than those furnished by petitioner (R. I, 166, 187, 225, 234).

The cover letter written by Folse dated October 5, 1961, stated (Gov. Ex. 2; R. I, 185–186):

> Enclosed please find a list of subcontract bids, proposals and estimates which may facilitate the verification of costs in pricing the Turtle Creek Towers (82) North Apartments. These prices represent the lowest prices obtainable at this date in all cases and are gathered from the files delivered under separate cover.
>
> I believe these costs are true and accurate though in all cases they may not be the ultimate ones by which contracts will be awarded. By this I mean to explain that negotiations will continue until the owner and architect are satisfied that the quality of the materials and workmanship are commensurate with the plans and specifications and represent the best economies.

items in his possession on October 5, 1961, from the same mechanical, electrical and elevator sub-contractors. He did not disclose these lower bids to the F.H.A. group.[2]

a. *Elevators.*—The amount specified in the October 5 letter by Folse as the lowest elevator bid was $298,600 (R. I, 186, 193–194). This bid was obtained in September 1961 from Mr. Glen Young, sales representative for Otis Elevator Company, after petitioner stated that he was in a hurry to get pricing information on elevator equipment for the Turtle Creek project (R. II, 357–359). It was a "good working price" based not on any detailed study of any plans and specifications, but on estimates of comparably sized buildings and more expensive equipment than was ultimately sold (R. II, 360, 366–369, 379–381). Thereafter, representatives of Otis Elevator Company entered into discussions with petitioner on the price aspects of the job, based upon a detailed study of the plans and specifications. They agreed on a price of $205,168 (R. II, 365, 381–383). Petitioner accepted this bid in writing on September 30, 1961 (R. II, 362–363). He did not disclose this contract to F.H.A. in his October 5, 1961, submission.

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[2] It was the theory of the government's case that at the time petitioner caused Folse to represent to F.H.A. that the high elevator, mechanical and electrical bids were the lowest prices obtainable and the lowest subcontract bids on October 5, 1961, petitioner had in hand substantially lower bids geared to the plans and specifications already submitted to F.H.A.; that he knowingly and deliberately did not submit such lower bids; and hence that he knowingly caused false representations to be made to the F.H.A. with intent to influence its action.

b. *Mechanical (plumbing, heating, air conditioning, etc.).*—The lowest mechanical bid listed in the October 5, 1961 letter was $1,672,340 (R. I, 186, 194–196). This bid was obtained after petitioner, about September 19, 1961, telephoned Robert Wallace, a mechanical contractor in Dallas, and stated that he wanted by the next day a high proposal for the mechanical work on the Turtle Creek project "for budgetary purposes, to make certain financial arrangements" (R. II, 438–439, 454–455, 467, 471). Wallace went through past files on similar projects, made a preliminary review of the mechanical drawings for this project, and submitted to petitioner by letter dated September 20, 1961, a "guesstimate" appearing on its face to be a firm proposal of $1,639,340 for the mechanical work, plus an optional additional $33,000 for refrigeration (R. I, 194–195; R. II, 438–440, 442, 467–469). Thereafter, Wallace & Company prepared a complete cost estimate of the mechanical work based on a complete review of the mechanical plans and specifications (R. II, 441–442). By letter dated September 26, 1961, it submitted a guaranteed lump sum bid, designated as a "revised proposal," of $999,000 plus an optional $33,000 for refrigeration (R. II, 441, 444–449). Petitioner accepted this proposal in his capacity as corporate president on the same day, September 26, 1961 (R. II, 449). Both the high and low proposals were based on the same plans and specifications, except that the first was based only on a preliminary examination (R. II, 455–456, 482). The low bid and contract were not disclosed to the F.H.A. group in the October 5, 1961 submission.

c. *Electrical.*—The lowest electrical subcontractor bid was stated in the October 5, 1961, letter to be $548,000 (R. I, 186, 192–193). In fact, petitioner obtained two bids on the project from the same electrical subcontractor on September 25, 1961. The one for $548,000 was furnished to petitioner "for the purpose of making a proper financial arrangement" (R. II, 428–429). This bid was based on the electrical plans and specifications plus "certain allowances that were not included in the initial plans and specs, electrically" (R. II, 397–399, 409, 415, 418, 430). The other bid was in the amount of $415,000 (R. II, 400–401, 427), and was determined "strictly in accordance with the plans and specifications" furnished by petitioner (R. II, 406–407, 416, 430).[4] Both bids were identical except for prices. They referred to the same plans and specifications. This bid was not disclosed to the F.H.A. group. Petitioner accepted the $415,000 proposal by letter dated November 2, 1961 (R. II, 403–404).

ARGUMENT

1. Petitioner argues that 18 U.S.C. 1010 proscribes false statements to F.H.A. only if made for the three purposes specifically enumerated in the statute—i.e.,

[4] The electrical contractor testified that the principal difference between the $548,000 and $415,000 bids resulted from including lighting fixtures in the higher bid which were not a part of the electrical plans and specifications because petitioner was going to buy them from someone else (R. II, 434–435). In the October 5, 1961, submission to F.H.A., lighting fixtures were listed separately from the electrical bid at $138,000 and characterized as additional project cost estimates of items not listed or bid in other items (R. I, 255–256).

obtaining (1) any loan or advance of credit (2) any extension or renewal of any loan, advance of credit, or mortgage or (3) any acceptance, release, or substitution of any security on such a loan or advance of credit (Pet. 13–15). The statute, however, contains a concluding phrase which covers false statements knowingly made to F.H.A. "for the purpose of influencing in any way the action of such Administration." Since petitioner caused false statements to be made for the purpose of influencing the F.H.A. cost analysis group to issue an inflated cost estimate on the Turtle Creek project, his conduct unambiguously falls within the general prohibition.[4] The cases cited by petitioner (Pet. 14–15) involved charges that false statements had been made for the purpose of obtaining a loan, and instructions to the jury were framed in terms of those indictments. Similar instructions are obviously not required when the charge is that a false statement was submitted to influence the F.H.A. in another way.

Petitioner's suggestion that the phrase "in any way" makes the general prohibition unconstitutionally vague (Pet. 13) is unsound. The context of the phrase indicates the statute was intended to assure that decisions made by F.H.A. officials on matters within their statutory jurisdiction would be based on truthful representations. "Void for vagueness simply means that criminal responsibility should not

[4] It is reasonable to infer that the false statements were given to obtain an inflated loan commitment and would, therefore, have properly been indictable as false statements for the purpose of obtaining a loan.

attach where one could not reasonably understand that his contemplated conduct is proscribed." *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32–33; see also *United States* v. *Harriss*, 347 U.S. 612, 617. Here petitioner intended that his false statements would improperly influence an official act.

2. There is no merit to petitioner's contention that the trial court gave inadequate instructions to the jury by failing to define the statutory phrase "for the purpose of influencing," which is said to embody the "specific intent to mislead, deceive or defraud" (Pet. 8–12).[5] Petitioner failed to request any definition at trial and the phrase is not one that intrinsically needs defining. As noted by the court of appeals, the trial court correctly charged the essential elements of the offense—knowingly and wilfully making a false statement or causing it to be made for the purpose of, in some way, influencing the action of the F.H.A. and with the knowledge that the statement was false. *E.g., Bins* v. *United States*, 331 F. 2d 390 (C.A. 5); *Henninger* v. *United States*, 350 F. 2d 849 (C.A. 10); *United States* v. *Pesano*, 293 F. 2d 229 (C.A. 2). The *mens rea* inherent in the offense under 18 U.S.C. 1010 is alleged in the indictment by the terms "knowingly" and "wilfully" and is adequately instructed by a definition of those terms. *United States* v.

[5] Petitioner also complains that the indictment should have contained an allegation of a specific intent to mislead, deceive or defraud (Pet. 3). However, no such objection to the indictment was made in the trial court or in the court of appeals. The indictment charged that the false statements were made for the purpose of influencing F.H.A. action.

Pesano, 293 F. 2d 229 (C.A. 2). The trial court defined those terms precisely as requested by petitioner (R. I, 77, 82–83).

3. Petitioner's contention (Pet. 18–21) that the evidence was insufficient to support his conviction is refuted by the facts set forth at pp. 3–7, *supra*. The evidence clearly established that, for the purpose of influencing the grant and the size of a loan from the F.H.A., petitioner submitted bids as the lowest available at a time when he knew that there were lower bids geared to the plans submitted to F.H.A. Indeed, he had already accepted two such lower bids.

Apart from knowledge and intent (which is clearly shown), the main thrust of petitioner's argument is that the lower bids remaining in his possession were based on different plans and specifications than the high bids. The jury properly concluded that the low bids were the ones applicable to the plans before F.H.A. The low elevator bid was based on specifications agreed upon well before petitioner's representations to F.H.A. These specifications were incorporated in the set of plans and specifications marked "Processing set *retain in Dallas*" (Defense Exhibit 19). In the four sets of plans and specifications identified at trial (Defense Exhibits 7, 13, 19 and 26), the mechanical and electrical specifications were identical in all relevant respects. Each of the subcontractors testified that his low bid was based on the plans and specifications furnished by petitioner.

Petitioner also contends that the government must, in addition to proving falsity beyond a reasonable

doubt, conform to the "two-witness" rule applicable to perjury prosecutions (Pet. 15–18). It is well settled that the two-witness rule is not applicable to a prosecution for making a false statement under 18 U.S.C. 1010 and comparable sections. See, *e.g.*, *United States* v. *Marchisio*, 344 F. 2d 653 (C.A. 2); *Ogden* v. *United States*, 303 F. 2d 724, 744–745 (C.A. 9), certiorari denied, 376 U.S. 973; *Neely* v. *United States*, 300 F. 2d 67, 69–70 (C.A. 9), certiorari denied, 369 U.S. 864; *Sells* v. *United States*, 262 F. 2d 815, 821–822 (C.A. 10), certiorari denied, 360 U.S. 913; *United States* v. *Killian*, 246 F. 2d 77, 82 (C.A. 7). Moreover, the perjury standard was, in fact, more than amply met, although the jury was not instructed that it was to apply that standard.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1966.

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